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No.

SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether a defendant who pleads guilty to two indictments alleging two different criminal conspiracies, as part of a plea bargain in which the government agrees not to prosecute him on other charges, is entitled to a factual determination of his contention, raised for the first time in a later collateral attack on his sentences, that the two conspiracies alleged were actually a single conspiracy.

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No.

UNITED STATES OF AMERICA, PETITIONER

v.

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The order and judgment of the court of appeals affirming the district court's grant of relief to respondents (App. 1a-4a) is unreported. The memorandum and order of the district court granting respondents relief (App. 5a-13a) is unreported. The prior opinion of the en banc court of appeals reversing the district court's denial of relief (App. 14a-86a) is reported at 781 F.2d 792. The prior opinion of the court of appeals panel (App. 87a-111a), which was vacated on the grant of rehearing en banc, is reported at 753 F.2d 811. The original memorandum and order of the district court denying respondents relief (App. 112a-123a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. 1a-4a) was entered on August 18, 1987. A petition for rehearing and

suggestion for rehearing en banc was denied on November 13, 1987 (App. 124a-125a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

Respondent Ray C. Broce is the president of respondent Broce Construction Co., Inc. Both respondents were named as defendants in two separate indictments filed in the United States District Court for the District of Kansas. Each indictment charged, among other things, conspiracy to rig bids on a specific Kansas highway construction project in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pursuant to plea bargains, both respondents entered guilty pleas to the Sherman Act counts of both indictments, and Mr. Broce also pleaded guilty to one count of mail fraud in violation of 18 U.S.C. 1341. The district court accepted the guilty pleas. Consistent with the plea bargains, the court imposed a total fine of $1.5 million ($750,000 on each Sherman Act count) on the corporation and sentenced Mr. Broce to concurrent two-year terms of imprisonment and a total fine of $101,000. Subsequently, respondents filed a motion to vacate the sentences imposed with respect to the second indictment on the ground that the sentences imposed constituted multiple punishment for the same offense in violation of the Double Jeopardy Clause. The district court initially denied the motion, but the court of appeals reversed and remanded for a factual determination. On remand, the district court granted the motion. The court of appeals affirmed.

1. In a two-count indictment filed November 17, 1981 (App. 143a-151a), respondents were charged with one

count of violating Section 1 of the Sherman Act and one count of mail fraud in violation of 18 U.S.C. 1341. The indictment alleged that the object of the Sherman Act conspiracy was to rig bids on Kansas Federal-Aid Highway Project No. 23-60-RS-1080(9) (the Meade County project), let by the State of Kansas on April 25, 1978. The indictment charged that the conspiracy began in or about April 1978. App. 147a.

Respondents were at all times represented by retained counsel. Plea negotiations began after the government sent a letter to respondents' counsel on January 11, 1982,[1] advising him that the government would seek an additional indictment against respondents for conspiracy to rig bids on a Ford County project let by the State of Kansas on July 17, 1979. Plea negotiations proceeded, and on January 22, 1982, the government sent respondents' counsel a letter enclosing draft plea agreements, which were eventually signed and were filed with the district court on February 8, 1982 (App. 126a-132a, 133a-135a).

In those agreements, both respondents agreed to plead guilty to the indictment charging them with conspiracy to rig bids on the Meade County project, and Mr. Broce agreed to plead guilty to the mail fraud charge. Respondents also agreed to plead guilty to a second indictment, which had not yet been filed, charging them with conspiracy to rig bids on a Barton County project let by the State of Kansas on July 17, 1979.[2] Respondents acknowledged in their plea agreements that the maximum fine for *each* Sherman Act count to which each of them was agreeing to plead guilty was $100,000 for Mr. Broce (App. 127a) and $1,000,000 for the corporation (App. 134a). See 15 U.S.C. 1. Mr. Broce also acknowledged that

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[1] The date stamp actually gave the year incorrectly as 1981.

[2] Respondents were never indicted for rigging bids on the Ford County project referred to in the government's letter of January 11, 1982.

consecutive sentences could be imposed (App. 127a). In return for the guilty pleas, the government agreed, among other things, (1) not to prosecute respondents for other antitrust violations in Kansas and Oklahoma;[3] (2) to dismiss the mail fraud count against the corporation in the November 17 indictment; and (3) to recommend a total fine of $1.5 million against the corporation on the Sherman Act charges (App. 127a-128a, 134a-135a).

On February 4, 1982, as had been contemplated in the plea agreements, respondents were charged in a separate one-count indictment (App. 136a-142a) with Sherman Act conspiracy. The indictment alleged that the object of the conspiracy was to rig bids on the Barton County project, Kansas Public Highway Project No. KRL 29-2(26). The indictment charged that the conspiracy began in or about July 1979. App. 139a.

On February 8, 1982, respondents entered guilty pleas to the two Sherman Act conspiracy charges in accordance with the previously negotiated plea agreements. At the hearing conducted pursuant to Fed. R. Crim. P. 11, the district court ascertained that respondents understood that they "would be admitting all the facts alleged in these charges" (2/8/82 Tr. 11). The district court also explained that, "so far as the corporation is concerned, the maximum punishment is a fine up to one million dollars on each [Sherman Act] charge" and that, "as to you [Mr. Broce] individually, * * * the maximum punishment is a fine up to one hundred thousand dollars and a term of imprisonment up to three years on each [Sherman Act]

[3] Respondents had in fact engaged in substantial violations of the Sherman Act in Oklahoma, some of which are described in detail (drawing on Mr. Broce's immunized testimony at two trials of Oklahoma co-conspirators following his guilty plea in this case) in *United States* v. *Washita Construction Co.*, 789 F.2d 809 (10th Cir. 1986), and *United States* v. *Metropolitan Enterprises, Inc.*, 728 F.2d 444 (10th Cir. 1984).

charge" (*id.* at 11-12). Mr. Broce indicated without qualification that he understood (*ibid.*). The court questioned Mr. Broce, under oath, as to whether the government's written statement of facts in support of the pleas (App. 129a-132a) was correct. In response, Mr. Broce stated that he intended to let each bid-rigging agreement "stand on its own" and thus refused to discuss a future job in Grey County at the time the Meade County job was rigged (2/8/82 Tr. 18). He also stated, with one other qualification not relevant here, that the government's statement of facts was correct (*id.* at 18-19). Defense counsel stated that he saw no reason "why the Court should not accept these pleas of guilty" (*id.* at 21). The court did accept the pleas.

Before sentencing, the government prepared and provided to defense counsel an "Official Version of the Offense" for inclusion in the presentence report. That document discussed a large conspiracy in Kansas in which respondents and others had participated before 1973 but stated that, "in about 1973, this conspiracy ended" (Official Version 1). It also stated that there were "two *separate* conspiracies giving rise to the Indictments" (*ibid.* (emphasis added)).

Sentencing occurred on March 15, 1982. Defense counsel was given an opportunity to state "any dispute with what the government has included in the pre-sentence report about the official version of the offense" (3/15/82 Tr. 6). Defense counsel expressed some disagreements with the Official Version but did not dispute the explicit statement in the Official Version that there were two separate conspiracies (*id.* at 6-7). The court asked whether there was "any legal reason * * * why sentence should not be pronounced," and defense counsel responded: "None known to the defendant, Your Honor" (*id.* at 8). The court then imposed on the corporation the fines that the government had agreed to recommend. The court also

sentenced Mr. Broce to two years' imprisonment and to fines of $50,000 on each Sherman Act count and $1000 on the mail fraud count. *Id.* at 10-11.[4] The government dismissed the mail fraud count against the corporation (*id.* at 12).

Respondents did not appeal. Nor did they, at any time before sentencing, claim that the two indictments in fact alleged the same conspiracy.

2. More than a year after the entry of their guilty pleas, respondents filed a motion pursuant to Fed. R. Crim. P. 35(a) to vacate their sentences on the charges contained in the second indictment. Relying on the intervening decision in *United States* v. *Beachner Construction Co.*, 555 F. Supp. 1273 (D. Kan. 1983), aff'd, 729 F.2d 1278 (10th Cir. 1984), respondents argued that there had been only a single conspiracy to rig bids in Kansas.[5] Respondents therefore contended that they were guilty of only one Sherman Act offense and that it violated the Double Jeopardy Clause to impose fines on both Sherman Act counts to which they had pleaded guilty.

[4] Mr. Broce has paid his $101,000 fine and served his prison term. The corporation has paid $750,000 of the $1,500,000 in total fines assessed on the two Sherman Act counts.

[5] The defendants in *Beachner* alleged that the large conspiracy discussed in the Official Version of the Offense in the present case—*i.e.*, a large, continuing conspiracy to rig bids on any and all Kansas highway jobs—did not (as the government contended) end in 1973, when the major organizer of the conspiracy went out of business. The defendants argued that the post-1973 bid-rigging agreements with which they were charged were merely part of the same large, continuing conspiracy. The district court agreed with the defendants and rejected the government's argument that, after 1973, each new bid-letting gave rise to an opportunity to form a new conspiratorial agreement. The government appealed, but the court of appeals held that the question was one of fact and that the district court's finding was not clearly erroneous.

The government argued that respondents' failure to raise their double jeopardy defense before judgment and sentence precluded them from doing so on collateral attack. The government also argued that respondents could not attack the factual and theoretical foundations of the indictments to which they had pleaded guilty. The government stipulated, however, that if the court reached the merits of the one-conspiracy-or-two issue it could " 'consider the record made in the evidentiary hearing' " held in the *Beachner* case (see App. 63a).

Relying on *Kerrigan* v. *United States*, 644 F.2d 47 (1st Cir. 1981), the district court held that a defendant asserting a double jeopardy claim may not contest the factual and theoretical foundations of the indictment to which he entered a guilty plea. In this case, the court noted that each indictment, on its face, charged a separate conspiracy. The court held that respondents had admitted their participation in separate conspiracies and therefore could not raise a double jeopardy claim that depended on the nonexistence of separate conspiracies. App. 112a-123a.

3. A divided panel of the court of appeals reversed (App. 87a-111a), but the court granted rehearing en banc. The en banc court also reversed by a divided vote (App. 14a-86a). Relying on *Menna* v. *New York*, 423 U.S. 61 (1975), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), the majority held that the Double Jeopardy Clause "stands as an inhibition upon the government's right to institute charges" that is "absolute" and not "subject to waiver" (App. 18a). The majority added that "the defendants' plea bargain cannot work an estoppel of their right to assert the invalidity of the charge" (App. 20a). The majority rejected the government's argument that "the defendants' pleas of guilty must be considered admissions of all the facts alleged in the indictments," asserting that the indictments

"did not specifically allege separate conspiracies" and reasoning that "the admissions of factual guilt subsumed in the pleas of guilty go only to the acts constituting the conspiracy and not to whether one or more conspiracies existed" (App. 21a). The majority recognized that its decision was at odds with "many cases which have held to the contrary" (*ibid.*).

Having decided that the district court erred by holding respondents to their admissions that two conspiracies existed, the court of appeals next addressed the issue whether two conspiracies did in fact exist. Although the majority suggested that on their faces the indictments did not charge more than one conspiracy, it ultimately concluded that "the question of whether the indictments charged one or two conspiracies is, in the context of this case, wholly factual" (App. 23a). Because the district court had not addressed that factual issue in its opinion, the court remanded the case "for a factual determination" (App. 24a).

Judge McKay joined the majority opinion, including the order remanding to the district court, but he expressed reluctance because he believed that as a matter of law the second indictment charged the same conspiracy as the first indictment (App. 25a). Judge Seymour agreed with the majority's holding that respondents could raise their double jeopardy claim on collateral attack, but not with its underlying reasoning that the Double Jeopardy Clause is "an 'absolute inhibition' upon government" (App. 28a). She also disagreed with the majority's decision to remand the case, arguing that "the *Beachner* findings should * * * be accorded full preclusive effect in the proceeding" (App. 39a).

Judges Barrett and Doyle filed separate dissenting opinions. Judge Barrett distinguished *Menna* and *Blackledge* on the ground that no factual hearing was required to

resolve the double jeopardy and due process issues in those cases (App. 50a-51a). Judge Barrett argued "that an accused waives his claim of double jeopardy to a subsequent criminal charge if the crimes charged, on their faces, are separate and distinct and if the evidence necessary to establish guilt as to one charge differs from that necessary to establish guilt as to another" (App. 51a (emphasis omitted)). Judge Barrett stated that each indictment, on its face, charged a separate conspiracy (App. 56a, 64a). Similarly, Judge Doyle concluded that *Menna* and *Blackledge* are distinguishable, and that the defendants had waived their double jeopardy argument in this case (App. 69a-86a).[6]

4. On remand, the district court followed the approach taken in *Beachner* and found as a matter of fact that "the two indictments returned against these defendants charge simply different aspects of the same conspiracy to restrain competition" (App. 13a). The court vacated the judgment and sentence entered on the second indictment (*ibid.*).

The government appealed, both renewing the argument that respondents were precluded from raising their double jeopardy claim in the circumstances of this case and arguing that the district court had committed reversible error in finding that there was only one conspiracy. While the appeal was pending, this Court decided *Ricketts* v. *Adamson*, No. 86-6 (June 22, 1987), holding that the defendant in that case had waived his double jeopardy rights through the terms of his plea agreement.

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[6] It is the 1986 decision of the en banc court of appeals, as partially reaffirmed by the 1987 panel decision, that we principally challenge in this petition. We did not seek review of the en banc decision at the time it was rendered because of our general position that review by this Court in criminal cases should await final disposition by the trial court. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 224 n.71 (6th ed. 1986).

The court of appeals, once again divided, affirmed in a short order and judgment (App. 1a-4a). The court wrote (App. 2a):

> Although *Ricketts* invalidates the broader rationale underlying the plurality opinion [*sic*] in *Broce*, that the double jeopardy prohibition "does not constitute an individual right which is subject to waiver," 781 F.2d at 795, it does not affect its narrower holding, based on clear Supreme Court precedent, that a guilty plea does not itself constitute a waiver of double jeopardy protection. *Id.* at 796-97; *see also Menna* v. *New York*, 423 U.S. 61, 62-63 & n.2 (1975) (guilty plea is merely an admission of factual guilt, which does not bar a claim that the state may not constitutionally prosecute the defendant no matter how validly his factual guilt is established); *Blackledge* v. *Perry*, 417 U.S. 21, 29-31 (1974).

The court also rejected the government's argument that there were in fact two conspiracies (App. 2a-3a). Judge Barrett dissented (App. 4a). Rehearing was denied, Judge Barrett again dissenting, and rehearing en banc was denied (App. 124a-125a).

REASONS FOR GRANTING THE PETITION

In *Menna* v. *New York, supra*, a case arising under the Double Jeopardy Clause, this Court was careful to state the limitations of its holding: "We simply hold that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute" (423 U.S. at 63 n.2). Earlier, in *Blackledge* v. *Perry, supra*, this Court had reached the same conclusion in a case arising under the Due Process Clause. The Court in *Blackledge* held that a plea of guilty to a felony indictment, returned following the defendant's demand of a trial de novo on a misdemeanor charge based

on the same conduct as the later felony charge, did not foreclose a contention that the bringing of the greater charge amounted to vindictive prosecution as a matter of law. In neither case was the guilty plea a result of plea bargaining in which the government made concessions to the defendant in exchange for his guilty plea. And in neither case did the constitutional challenge depend on establishing facts contrary to the allegations contained in the indictment to which the defendant had pleaded guilty.

The question presented by this case is whether *Menna* and *Blackledge* should be extended in two ways. First, should a defendant, notwithstanding *Menna*'s explicit limitation to cases in which the invalidity of the charge can be "judged on its face," be allowed long after his guilty plea to go behind the allegations of the indictment and obtain a factual determination, contrary to the allegations in the indictment, that two facially distinct crimes are in fact the same offense? Second, should a defendant who—like respondents but unlike the defendants in *Menna* and *Blackledge*—negotiates a guilty plea and secures an agreement from the government, in exchange for that plea, not to prosecute other charges be allowed later to use the Double Jeopardy Clause to free himself from some of his half of the bargain? The court of appeals answered both questions in the affirmative.

Whether *Menna* and *Blackledge* should be extended in one or both of these ways is a question that has arisen frequently in the courts of appeals; indeed, a majority of the regional courts of appeals have now had occasion to address the question. Compare *Kerrigan* v. *United States*, 644 F.2d 47 (1st Cir. 1981) (holding defendant to his plea bargain), and *Brown* v. *Maryland*, 618 F.2d 1057 (4th Cir.) (same), cert. denied, 449 U.S. 878 (1980), and *United States* v. *Pratt*, 657 F.2d 218 (8th Cir. 1981) (same), and *United States* v. *Allen*, 724 F.2d 1556 (11th Cir. 1984) (same), with *United States* v. *Atkins*, No. 86-1610 (5th

Cir. Dec. 8, 1987) (allowing defendant, despite plea bargain, to make double jeopardy argument), and *United States* v. *Baugh*, 787 F.2d 1131 (7th Cir. 1986) (same), and *Launius* v. *United States*, 575 F.2d 770, 772 (9th Cir. 1978) (same). See also *United States* v. *Blocker*, 802 F.2d 1102, 1103-1104 (9th Cir. 1986) (allowing double jeopardy challenge without indicating whether plea resulted from plea bargaining); *United States* v. *Broussard*, 645 F.2d 504, 505 (5th Cir. 1981) (same).

The decision below is in square conflict with the decisions of at least four courts of appeals. In addition, the court below went beyond all prior decisions in this area. Before this case, no court of appeals had ever required a trial court to conduct a factual inquiry into whether two facially distinct crimes to which a defendant has pleaded guilty were in fact the same offense. The court of appeals did so in this case even though the defendants had admitted that two conspiracies existed. For these reasons, and because the decision below is incorrect, review by this Court is warranted.[7]

1. a. The en banc court of appeals correctly noted that its decision was contrary to "many cases" (App. 21a). In particular, the decision below conflicts directly with *Kerrigan* v. *United States, supra; Brown* v. *Maryland, supra; United States* v. *Pratt, supra*; and *United States* v. *Allen, supra.*

In *Kerrigan*, the defendant was charged with two conspiracies in two indictments (644 F.2d at 47-48). He entered into a plea bargain in which he agreed to plead

[7] We also strongly disagree with the holdings below, which are based on *United States* v. *Beachner Construction Co., supra*, that the two conspiracies charged in the two indictments were in fact the same conspiracy. See, *e.g., In re Grand Jury Proceedings*, 797 F.2d 1377, 1384 (6th Cir. 1986) (criticizing approach used in *Beachner* to find only one conspiracy), cert. denied, No. 86-663 (Jan. 12, 1987). We do not believe, however, that that fact-bound issue warrants this Court's review.

guilty to both conspiracy charges and the government agreed to dismiss one other count and to make certain recommendations concerning sentence. His pleas were accepted, and he was sentenced to three years' imprisonment for one conspiracy and a consecutive two-year term for the other. *Id.* at 48. On collateral attack (see *id.* at 47), Kerrigan argued "that there was in fact only one conspiracy" (*id.* at 48). The First Circuit rejected Kerrigan's argument that *Menna* required an evaluation of his double jeopardy claim on the merits, observing that *Menna* does not hold "that a defendant who pleaded guilty may later contest the factual and theoretical foundations of the indictment to which he pleaded, so as to show that, in fact, he committed only a single offense" (*id.* at 49). And the court refused to consider Kerrigan's argument that there was in fact only one conspiracy, holding that "Kerrigan's claim of double jeopardy must be evaluated under the version of facts stated in the indictment, not against an alternative version of events which Kerrigan now claims is more accurate" (*ibid.*).

Kerrigan is virtually identical to the present case, and its reasoning plainly would have required rejection of respondents' motion to vacate their sentences; indeed, *Kerrigan* was the basis of the district court's original decision denying respondents relief. The court of appeals dismissed *Kerrigan* as unpersuasive (App. 20a), but it also endeavored to distinguish the case on two grounds.[8] Neither will work. First, the court stated that the portion of *Kerrigan* on which the government relied was dictum because the *district court* in that case had not ruled on "the question of waiver" (App. 20a n.4). But the holding of a

[8] The court of appeals also said, apparently in an effort to distinguish *Kerrigan*, that "the admissions of factual guilt subsumed in the pleas of guilty go only to the acts constituting the conspiracy and not to whether one or more conspiracies existed" (App. 21a). But that statement simply contradicts *Kerrigan*; it does not distinguish the case.

case is the basis that the rendering court gives for its decision, not the basis that a lower court gave for reaching the same result. And the holding of *Kerrigan* is that a defendant who has pleaded guilty to two conspiracies has no right to argue on collateral attack that there was only one conspiracy, except, perhaps, when the indictments on their faces show that there was only one conspiracy. Second, the court below stated that in this case, unlike *Kerrigan*, "the * * * indictments did not specifically allege separate conspiracies" (App. 21a). That is simply not so. Each indictment in this case alleged the existence of a conspiracy whose object was to rig bids on a particular construction project, and each indictment alleged a different beginning date for the conspiracy. If those allegations were true, there were two conspiracies. See *Kotteakos* v. *United States*, 328 U.S. 750, 769 (1946) (distinguishing "the common purpose of a single enterprise" from "the several, though similar, purposes of numerous separate adventures of like character"). As the *Kerrigan* court said, "indictments charging two or more agreements, even agreements to commit similar or related crimes, charge more than one conspiracy" (644 F.2d at 49).

In *Brown*, the defendant was charged, on a felony murder theory, with first-degree murder punishable only by death or life imprisonment. He entered into a plea bargain with the State and pleaded guilty to second-degree murder and attempted armed robbery. He received consecutive sentences of 25 and 10 years. On collateral attack, he argued that, because the original murder charge had been based on a felony murder theory, the underlying felony—armed robbery—was a lesser included offense, and he could not be sentenced for both second-degree murder and armed robbery. 618 F.2d at 1058. The Fourth Circuit did not resolve that question on the merits because it held that "Brown's voluntary and intelligent guilty plea waived his right to object to his convictions on double

jeopardy grounds" (*id.* at 1059). If the result in *Brown* is correct, then *a fortiori* the decision below is wrong.[9]

In *Pratt*, the defendant was charged with six offenses. As part of a negotiated plea bargain, he pleaded guilty to two counts, each of which alleged a substantive narcotics offense occurring on the same day, and the government moved to dismiss the remaining four counts. 657 F.2d at 219. The district court, like the district court in this case, ascertained that the defendant understood that he could receive cumulative punishments for the offenses to which he had pleaded guilty (*id.* at 219-220), and it then imposed two consecutive five-year sentences (*id.* at 220). On collateral attack (see *id.* at 218), the defendant "urge[d] that in fact he had been punished twice for what was really only one offense" (*id.* at 220). The Eighth Circuit refused to consider that claim, observing that Pratt "pleaded guilty, presumably, because he preferred the certainty of a maximum of ten years to the risk of conviction and punishment on each of six counts." The court then considered and rejected the argument "that *Menna* * * * requires us to reach the merits of Pratt's double-jeopardy argument." *Ibid.* The court observed (*id.* at 221):

> Menna's claim was wholly unrelated to the facts, whereas the whole question raised by Pratt is intertwined with the issue of exactly what it was that he and the DEA agent agreed to buy and sell—two items, or only one. Menna's case was not complicated by the presence of additional charges which the state agreed to dismiss. And Menna did not explicitly and voluntarily expose himself to the very event (here, consecutive terms of imprisonment) that he later

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[9] The *Brown* court did not discuss *Menna* or *Blackledge*, but those cases are distinguishable from *Brown* because the guilty pleas in those cases were not entered pursuant to plea bargains. This Court denied certiorari in *Brown*.

> claimed was a violation of the Double Jeopardy Clause. Pratt, by contrast, never made a double-jeopardy argument until months after his sentence. He was aware of all the facts later asserted in support of that argument. He had no right to be surprised at the sentence that was imposed. He received the benefit of his bargain, dismissal of the other four counts.

In all of these respects, *Pratt* is on all fours with the present case. The "whole question raised by" respondents is "the issue of exactly what it was that" they and their co-conspirators agreed to do—to rig bids on two particular occasions through agreements " 'stand[ing] on [their] own' " (see p. 5, *supra*) or, instead, to rig bids on all available occasions. There were "additional charges" (both pending and contemplated) in this case "which the [United States] agreed to dismiss" and not to bring. Respondents "explicitly and voluntarily exposed [themselves] to the very event" (here, cumulative fines) "that [they] later claimed was a violation of the Double Jeopardy Clause." Respondents "never made a double-jeopardy argument until months after [their] sentence[s]." Respondents were "aware of all the facts later asserted in support of that argument."[10] Respondents "had no right to be surprised at the sentence[s] that were imposed," for the corporation received precisely the sentence that the United States and respondents had agreed the government would recommend, and Mr. Broce explicitly acknowledged that the range of permissible punishments in his case included fines of up to $100,000 and imprisonment for up to three years on each Sherman Act count—much more than the $101,000 *total* fine and two-year term of imprisonment

[10] Of course, respondents did not have the *Beachner* record or the *Beachner* decision in their possession at the time of their pleas and sentencing, for the hearing in *Beachner* came later. But there is no good reason why, if respondents wanted to litigate this issue, they could not have done so precisely as the *Beachner* defendants later did.

that he in fact received. And respondents "received the benefit of [their] bargain[s]," including dismissal of the mail fraud count against the corporation and a promise not to prosecute respondents for other claims committed in both Kansas and Oklahoma. Yet the court below reached the opposite result from the Eighth Circuit. The conflict between the Eighth and Tenth Circuits (and the error of the latter's contention that its result is compelled by *Menna*) could not be clearer.

In *Allen*, the defendant was charged with 17 offenses. As part of a negotiated plea bargain, he pleaded guilty to four counts, one of which (Count 6) was for transporting a stolen Ferrari in interstate commerce and one of which (Count 14) was for transporting a stolen Porsche in interstate commerce. The remaining 13 counts were dismissed. As in the present case, the defendant acknowledged that he could receive cumulative punishments on all counts to which he pleaded guilty. The district court imposed consecutive five-year sentences on Counts 6 and 14 (as well as one consecutive and one concurrent sentence on the other two counts). 724 F.2d at 1557. On collateral attack (see *ibid.*), the defendant argued that "the Ferrari and Porsche were transported as part of a single shipment and therefore Counts 6 and 14 constituted a single offense for which he could receive only a single sentence under the double jeopardy clause" (*id.* at 1558). The Eleventh Circuit refused to consider that claim, explicitly adopting the Eighth Circuit's analysis in *Pratt*. The court observed: "[Allen] has received the benefit of the dismissal of the other 13 charges and now wishes to renege on his part of the bargain. This we will not permit." *Ibid.* Once again, there can be no doubt that the court's reasoning would have required a different result than the one the court of appeals reached in the present case. Respondents received the benefit of their bargains and would not, in the Eleventh Circuit, be allowed to renege on their parts of the bargains.

Thus, the precedent of at least four circuits stands solidly against the result reached in this case. See also *United States* v. *Herzog*, 644 F.2d 713, 716 (8th Cir.), cert. denied, 451 U.S. 1018 (1981); *United States* v. *Solomon*, 726 F.2d 677, 678 n.2 (11th Cir. 1984); *United States* v. *Griffin*, 765 F.2d 677, 680-682 (7th Cir. 1985); cf. *United States* v. *Sheehy*, 541 F.2d 123, 130 & n.20 (1st Cir. 1976) (defendant may not raise multiplicity argument for the first time on appeal); *United States* v. *Perez*, 565 F.2d 1227, 1232 (2d Cir. 1977) (double jeopardy argument waived if not asserted before trial); *United States* v. *Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984) (same), cert. denied, 472 U.S. 1017 (1985). The conflict between the decision below and the decisions of other courts of appeals on this frequently recurring issue warrants this Court's attention.

b. Insofar as the decision below holds that a defendant may raise double jeopardy claims on appeal or collateral attack despite a prior counseled, negotiated guilty plea, the decision does find some support in the decisions of three other circuits. *United States* v. *Atkins, supra; United States* v. *Baugh, supra; Launius* v. *United States, supra*; see also *United States* v. *Blocker, supra; United States* v. *Broussard, supra*. But the decision below does more than that: it also allows the defendants to obtain a factual determination that the allegations in the indictments—specifically, the allegations that the conspiracies began on two separate dates and had two different objects (and were thus distinct)—were not true, even though they have previously admitted those facts.[11] The court held that "the

[11] Respondents' admissions were not limited to those that were inherent in the guilty pleas themselves, *i.e.*, admissions of the facts alleged in the indictments. Respondents were given explicit, on-the-record opportunities to express any disagreement with the government's version of the offenses, which included an express reference to the separate conspiracies giving rise to the indictments. With a few exceptions that are not pertinent here, respondents expressed agreement with that version (see p. 5, *supra*).

question of whether the indictments charged one or two conspiracies is, in the context of this case, wholly factual" (App. 23a), and it remanded "for a factual determination" (App. 24a).[12]

[12] Two of the seven judges of the en banc court suggested that the two indictments in this case could, without the need for *any* findings of fact by the district court, be deemed to charge only a single conspiracy. The majority, however, did not take this route. Furthermore, it would have been manifest error for the court to hold, without any findings of fact, that the two charged conspiracies were the same. Judge McKay's theory was that—without regard to the factual findings in *Beachner* and without the need for factual findings in this case—these two indictments on their face alleged the same conspiracy. But the scope of any conspiracy is the scope of the unlawful agreement. See *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975); *Braverman* v. *United States*, 317 U.S. 49, 52-53 (1942). And these two indictments alleged that there were two different ageements: an agreement beginning in April 1978, to rig bids on the Meade County project, and an agreement, beginning in July 1979, to rig bids on the Barton County project. Only if those factual averments were untrue—and there was but a single agreement beginning sometime earlier—did these two indictments allege the same conspiracy.

Judge Seymour's theory was that the findings of fact in *Beachner* collaterally estopped the government from relitigating the question whether there had been a single conspiracy to rig bids on highway projects throughout the 1970s. But respondents were not parties in *Beachner*. Judge Seymour's theory is therefore one of nonmutual collateral estoppel against the government—a theory that this Court unanimously rejected in *Standefer* v. *United States*, 447 U.S. 10 (1980). Indeed, there is considerable irony in Judge Seymour's approach. She would allow respondents to use *Beachner*, a case in which respondents were not parties, to estop the government from arguing that there were two separate conspiracies in this case. Yet she apparently would not allow the government to use respondents' admission in *this case*, which came long before *Beachner*, to estop them from arguing that there were *not* two separate conspiracies.

That factual determination is precisely what the First Circuit in *Kerrigan* held that defendant could not obtain (644 F.2d at 49). See also *United States* v. *Pratt, supra; United States* v. *Allen, supra*. Moreover, before this case, no court had to our knowledge held that a defendant could obtain such a determination. In *Menna*, this Court carefully limited its holding to the situation in which the validity of the double jeopardy claim could be "judged on [the] face" of the indictment (423 U.S. at 63 n.2). And, in the prior court of appeals cases extending *Menna* to cover defendants who have pleaded guilty in exchange for prosecutorial concessions, the courts had resolved the double jeopardy claims without contradicting the indictment or requiring findings of fact. See *Launius*, 575 F.2d at 771 ("[i]t appeared on the face of the indictment that but one agreement was involved and hence but one conspiracy"); *Broussard*, 645 F.2d at 505 (rejecting double jeopardy claim without requiring factfinding); see also *Blocker*, 802 F.2d at 1104-1105 (same); *Baugh*, 787 F.2d at 1132 ("This court need not transcend the four corners of the information in this case in order to assess the validity of Baugh's claim.").

In this case, however, and in one subsequent decision (*United States* v. *Atkins, supra*), courts of appeals have required district courts, on collateral attack, to conduct hearings in order to resolve factual disputes that the defendants could have raised, but did not raise, before entering their pleas of guilty. According to these decisions, the Constitution requires that result. If these decisions are followed, they portend a nightmare for the federal courts as well as for state and federal prosecutors. Any incarcerated defendant who as a result of a guilty plea has received consecutive sentences for two similar crimes, and any defendant who as a result of a guilty plea has been assessed cumulative fines for two similar crimes, would have an absolute right to require a factual hearing to determine whether those crimes are actually distinct. That will be true notwithstanding the defendant's failure to raise this factual issue at any time before pleading guilty. It will be true no matter how much time has passed since conviction. As the requirement of a factual hearing is asserted to be of federal constitutional origin, this claim will be cognizable in habeas corpus actions brought by state prisoners as well as on collateral attack by convicted federal defendants. And, according to the court below (but not the Fifth Circuit in *Atkins*), the defendant's right to obtain a factual determination of his double jeopardy claim includes the right to contradict facts he admitted in his plea-taking or sentencing hearing.[13]

Thus, the decision below, in addition to conflicting with the decisions of other circuits, is literally unprecedented and has far-reaching implications. Review by this Court is warranted.

2. The decision below is incorrect for two separate reasons. First, respondents' claim of double jeopardy—unlike the constitutional claims presented in *Menna* and *Blackledge*—depends on factual assertions inconsistent with the facts set forth in the indictments. A counseled plea of guilty, however, is an admission of the material facts set forth in the indictment. To the extent that the double jeopardy claim depends on contrary facts, the guilty plea "*quite validly* removes the issue of [double jeopardy] from the case" (paraphrasing *Menna*, 423 U.S. at 62 n.2). Second, this case is unlike *Menna* and *Blackledge* in that it involves more than a mere guilty plea: it involves a plea agreement. Respondents' agreement to

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[13] The *Atkins* court limited its holding in a way that would have required a denial of relief to respondents in the present case: "A petitioner who later contests his sentence on double jeopardy grounds after entering a guilty plea * * * has lost his right to challenge or dispute either the information in the indictment or any other facts he admitted when his guilty plea was taken." Slip op. 958.

plead guilty to two counts, in exchange for the government's promise not to bring other charges, was a valid and binding agreement that "removed the double jeopardy bar" (*Ricketts* v. *Adamson*, slip op. 6).

a. The indictments charged two different conspiracies, beginning on different dates, to rig bids on two different projects. There is no question of double jeopardy in this case unless those allegations are factually wrong. But respondents admitted the allegations by pleading guilty, and they had absolutely no right—constitutional or otherwise—later to litigate factual questions that were resolved by their pleas.

It is well established that an unconditional plea of guilty is an admission of all the elements and material facts of the formal criminal charge maintained in the indictment. *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969); see also *Menna*, 423 U.S. at 62-63 n.2 (guilty plea admits "factual guilt"). As such, the guilty plea "is itself a conviction. Like a verdict of the jury it is conclusive." *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927); see also *Mabry* v. *Johnson*, 467 U.S. 504, 508 (1984). Respondents knew that they were making factual admissions: the district court admonished them at the plea-taking hearing that by pleading guilty they would be admitting all of the facts alleged in the indictments. And, as we have already noted, respondents were given further opportunities to dispute the government's version of their offenses, including its explicit statement that there were two separate conspiracies, yet they did not take those opportunities. Indeed, Mr. Broce even volunteered while under oath—in direct contradiction to the theory later adopted in *Beachner*—that he intended each bid-rigging agreement to "stand on its own" (2/8/82 Tr. 18).

The Double Jeopardy Clause does not entitle a defendant to mount a collateral attack on the factual determination, made by his own admission via a guilty plea, that he

entered into two conspiratorial agreements rather than one. The double jeopardy issue is in this respect like the issue of factual guilt: a defendant has a constitutional right not to be punished unless he is guilty of crime, but his counseled plea of guilty "*quite validly* removes the issue of factual guilt from the case" (*Menna*, 423 U.S. at 62 n.2).[14] Nor is there any justification for construing the indictments in this case as anything other than an allegation that two conspiracies existed: one, starting in April 1978, to rig bids on the Meade County project, and one, starting in July 1979, to rig bids on the Barton County project.

It is true that the prosecution (together with the grand jury), not the defense, determines what facts will be alleged in an indictment. But a defendant who thinks that the government's version of the facts is either inaccurate or incomplete can litigate disputed facts by obtaining a pretrial hearing or by going to trial.[15] Unconditional guilty

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[14] The court of appeals cited *Launius* v. *United States*, *supra*, for the proposition that the factual admissions "subsumed in the pleas of guilty go *only* to the acts constituting the conspiracy and not to whether one or more conspiracies existed" (App. 21a (emphasis added)). There is, however, nothing in *Launius* that supports that proposition.

[15] Because it is not the role of an indictment to negate all possible defenses (*United States* v. *Sisson*, 399 U.S. 267, 288 (1970)), it will, of course, often be the case that the factual allegations in an indictment will be incomplete in the sense that, although they do not themselves *show* a violation of the Double Jeopardy Clause, they also are not sufficient to *disprove* the double jeopardy defense. A defendant who does not plead guilty may then attempt to establish a valid double jeopardy defense, in pretrial proceedings or at trial, either by proving that the allegations of the indictment are untrue or by proving other facts that are neither alleged in nor contradicted by the indictment. But a defendant who chooses to plead guilty rather than make such a factual showing forfeits his right to make that showing. In any event, in *this* case no showing sufficient to support a double jeopardy defense could have been made without contradicting the factual allegations of the indictments.

pleas, whether negotiated or otherwise, are for defendants who choose not to litigate issues of fact, and there is no reason why they should not be held to that choice.[16]

b. Respondents entered into a plea agreement under which the United States agreed not to prosecute them on other charges in return for their pleas of guilty to two conspiracy charges. The plea agreement was a valid contract. Having entered into it and received the benefit of it, respondents should not have been allowed to repudiate their half of the bargain.

"[T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott*, 437 U.S. 82, 99 (1978).[17] Just last Term,

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[16] *Menna* and *Blackledge*, which hold that in certain circumstances a guilty plea does not waive legal rights, are distinguishable from this case in two different respects. First, it is not necessary to find a "waiver" in this case in order to hold respondents to their guilty pleas: our contention is not that the plea of guilty to an indictment alleging facts constituting two crimes "waives" the double jeopardy bar—any more than a guilty plea "waives" the right not to be punished for a crime one has not in fact committed. Rather, our contention is that the guilty pleas here resolved the factual issue in a way that removed any double jeopardy issue from the case. Second, in both *Menna* and *Blackledge* the defendant faced only a single charge and contended that his plea of guilty to that charge was invalid because, in light of an earlier conviction, the prosecutor had no power to "hale him into court" on that charge in the first place, and thus had no power to enforce the defendant's plea of guilty to a charge that he should never have faced. Here, however, there is no doubt that the United States had the right to prosecute respondents for Sherman Act conspiracy at the time it did so prosecute them; the only doubt is whether it had the right to "hale them into court" on one count or two. And respondents' *simultaneous* pleas of guilty to both counts answer that question in a way that the guilty pleas in *Menna* and *Blackledge* did not.

[17] This statement from *Scott* encapsulates the underlying principle of numerous cases in which this Court has held that, when it is the defendant's own actions that lead to more than one prosecution for a

this Court applied that principle to the case of a defendant who—like respondents—sought to invoke the Clause as a means to escape from the terms of his plea agreement. In *Ricketts* v. *Adamson, supra*, this Court held that the defendant could be convicted of first-degree murder even after his prior guilty plea to a lesser included offense, because *he had agreed* that if he failed to give certain promised testimony the original first-degree murder charge would be automatically reinstated (slip op. 7). *Adamson* thus squarely holds that a defendant may validly agree to a bargain that includes the possibility of a second prosecution for the same offense. If he chooses to take actions that subject him to a second prosecution, the "Double Jeopardy Clause does not relieve him from the consequences of that choice" (slip op. 9).

Like the defendant in *Adamson*, respondents in this case made a voluntary choice. Rather than risk prosecution on all of their bid-rigging activities in Kansas and

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single charge, the Double Jeopardy Clause does not forbid that result. See, *e.g.*, *United States* v. *Ball*, 163 U.S. 662, 671-672 (1896); *United States* v. *Tateo*, 377 U.S. 463, 465 (1964); *United States* v. *Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion); *United States* v. *Dinitz*, 424 U.S. 600, 608 (1976); *Lee* v. *United States*, 432 U.S. 23, 33 (1977); *Scott*, 437 U.S. at 93; *Sanabria* v. *United States*, 437 U.S. 54, 63 n.15 (1978). For example, multiple prosecutions growing out of the same offense are permissible when the second proceeding was prompted or made necessary by the defendant's voluntary actions. Thus, "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." *Jeffers* v. *United States*, 432 U.S. 137, 152 (1977) (plurality opinion). And the Court has held that a defendant's guilty plea to a lesser included offense does not bar trial on the greater offense charged along with it, if it was the defendant's effort that led to "separate disposition of counts in the same indictment." *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984). See also *Garrett* v. *United States*, 471 U.S. 773, 798 (1985) (O'Connor, J., concurring).

Oklahoma, they agreed to plead guilty to specific charges in exchange for the government's agreement not to prosecute them further (and other government concessions). Now that respondents have received those benefits, they would like to "use the Double Jeopardy Clause as a sword" (*Ohio* v. *Johnson*, 467 U.S. at 502) and avoid their obligations under the plea agreement. But if the government may, as in *Adamson*, prosecute a defendant on the original charges following the defendant's breach of a plea agreement, then the government should also be permitted to hold the defendant to the plea agreement in the first place without regard to the obstacles the Double Jeopardy Clause might impose in the absence of the plea agreement.

As in *Adamson*, the agreements into which respondents entered in this case were valid and enforceable bargains. The only basis on which respondents seek to escape from those bargains is the one the Court rejected in *Adamson*: that the multiple prosecutions (and, in this case, sentences) to which they have been subjected, although expressly contemplated in the agreements, are nevertheless barred by the policy of the Double Jeopardy Clause itself. That policy, however, is no reason why a counseled defendant who agrees to plead to a facially valid indictment should not be held to his bargain, particularly one from which he has received substantial benefits.[18] "The parties could

[18] Respondents have permanently obtained the benefit of their bargain here. The events of the last six years effectively preclude the United States from prosecuting respondents in response to their refusal to pay the full fines imposed pursuant to the plea agreement. Mr. Broce testified under a grant of immunity at several Oklahoma trials. Moreover, the passage of time, even if the statute of limitations has not yet expired, makes an Oklahoma prosecution a most unattractive and perhaps impossible alternative. Indeed, as a general matter it is a predictable consequence of allowing defendants to raise constitutional claims for the first time on collateral attack, after earlier guilty pleas, that the government will no longer be in a position to go forward with a full prosecution of the charges dismissed in reliance on the

have struck a different bargain, but permitting the [United States] to enforce the agreement the parties actually made does not violate the Double Jeopardy Clause" (*Adamson*, slip op. 10).[19]

Indeed, this Court has long recognized that plea agreements "are consistent with the requirements of voluntariness and intelligence—because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange." *Mabry* v. *Johnson*, 467 U.S. at 508. When both the prosecution and the defense make concessions to secure a plea bargain that each perceives provides substantial benefits, a court should respect the bargain. The question whether the government could otherwise have prosecuted the defendants on each of two counts is properly treated as foreclosed by the parties' agreement.[20]

plea agreement. See, *e.g.*, *United States* v. *Griffin*, 765 F.2d 677, 681-682 (7th Cir. 1985); Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1257 (1977); see also *Kuhlmann* v. *Wilson*, No. 84-1479 (June 26, 1986), slip op. 16 (opinion of Powell, J.).

[19] We recognize, of course, that *Adamson* did not involve the prohibition embodied in the Double Jeopardy Clause against multiple punishments for the same offense. But the acceptance of the possibility that the sentencing court would impose multiple punishments for the two conspiracy charges in this case was part and parcel of the bargain that respondents struck with the government, in return for the nonprosecution of charges that carried with them the potential for substantial additional punishment. Respondents acknowledged as much (see pp. 3-4, *supra*). There is no logical reason why a defendant who strikes such a bargain should be able to escape from his bargain any more readily than the defendant in *Adamson*. "Respondent[s] [were] fully aware of the likely consequences when [they] pleaded guilty; it is not unfair to expect [them] to live with those consequences now." *Mabry* v. *Johnson*, 467 U.S. at 511.

[20] See *United States* v. *Pratt*, *supra*; *United States* v. *Allen*, *supra*; 2 W. LaFave & J. Israel, *Criminal Procedure* § 20.6, at 680-681 (1984);

Nothing in *Menna* or *Blackledge* affects this analysis, for neither case involved an agreement not to bring other charges in exchange for the defendant's guilty plea. Indeed, in a different context, this Court has distinguished *Blackledge* on just that ground, holding that its analysis does not apply to "the give-and-take negotiation common in plea bargaining between the prosecution and defense." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 362 (1978); *United States* v. *Goodwin*, 457 U.S. 368, 375-380 (1982); see also *Blackledge*, 417 U.S. at 36-37 (Rehnquist, J., dissenting).

The government agreed not to pursue other charges against respondents in reliance on their promise to plead guilty to two Sherman Act conspiracies—not one—yet the result of the decision below is that respondents have secured the full benefit of the government's promise while paying only the fines assessed on one count. Had respondents raised their double jeopardy argument at the time of plea negotiations, the government could have elected to pursue other charges (in particular, Oklahoma conspiracy charges) and either to litigate those charges or to agree that respondents could plead guilty to one Kansas conspiracy and one Oklahoma conspiracy in exchange for the benefits that respondents actually received.[21] But respondents

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Westen, *supra*, 75 Mich. L. Rev. at 1259 (footnote omitted) (a defendant "can * * * forfeit complete defenses to a charge if, by his conduct, he leads the state to believe that it will not have to take him to trial on other outstanding charges"); Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 Mich. L. Rev. 1265, 1293 (1978) ("[i]f the defendant prefers the existing charges to the prospective charges and agrees to forego the double jeopardy defense in exchange for the benefit of not facing the new charges, a court could reasonably respect the bargain, since the government gave up a legitimate opportunity to prosecute in order to please the defendant").

[21] Of course, the government and respondents could also have litigated at the time over the constitutional validity of the two Kansas

chose a different course, withholding their double jeopardy argument until later, and the court of appeals has now rewarded that delay. We know of no double jeopardy principle—and *Menna* and *Blackledge* certainly stand for none—that requires that result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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charges that actually were brought. Respondents, however, never joined issue on that subject until a year after they pleaded guilty to those charges.

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